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No. 87-1439

In the Supreme Court of the United States

OCTOBER TERM, 1987

NORMAN D. REVIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

WILLIAM KANTER
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the bankruptcy judge, who ordered petitioner to turn over property belonging to a debtor, had the authority to direct him to appear personally to show cause why he should not be held in contempt for failing to comply with the order.

2. Whether the district court clearly erred in finding that petitioner had wilfully refused to comply with the bankruptcy judge's order to appear and explain his refusal to turn over the property.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. A1-A17) is reported at 834 F.2d 1198. The opinion of the United States District Court for the Southern District of Texas is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (Pet. App. A18) was entered on December 21, 1987. A petition for rehearing and suggestion for rehearing en banc was denied

on January 29, 1988 (Pet. App. A19). The petition for a writ of certiorari was filed on February 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted by a federal district court for contempt of court under 18 U.S.C. 401(3), which makes it a criminal offense to engage in "[d]isobedience or resistance to [the] lawful writ, process, order, rule, decree, or command" of a federal court. He was sentenced to six months' imprisonment.

1. Petitioner is a former employee of an individual debtor whose estate was the subject of bankruptcy proceedings in the Southern District of Texas. During the course of the bankruptcy proceedings, the trustee of the debtor's estate filed a complaint seeking to compel petitioner to turn over a valuable gold coin which belonged to the estate. Following hearings, the bankruptcy judge determined that petitioner was in possession of the coin, which was valued at approximately $100,000, and issued an order directing him to turn over the coin to the trustee within three days.

Petitioner did not comply with the order. Several days after the deadline for delivering the coin had passed, petitioner filed an appeal from the order, but he did not seek a stay pending appeal. In the absence of a stay, the bankruptcy judge entered an order directing petitioner to appear and show cause why he should not be held in contempt for his failure to turn over the coin (Pet. App. A2 & n.2). Petitioner's counsel appeared at the show-cause hearing, but petitioner himself did not attend. The bankruptcy judge issued a second order "to provide [pe-

titioner] one more chance to appear to show cause why he should not be held in contempt" (*id.* at A4 & n.4). Petitioner failed to appear for the second show-cause hearing as well. The bankruptcy judge thereafter certified facts to the district court in support of a finding of criminal contempt based on petitioner's refusal to comply with the show-cause orders.

The district court issued its own orders commanding petitioner to appear before it. When he again refused to obey, the district court ordered petitioner's arrest. Petitioner was apprehended by a United States Marshal in Washington, D.C., following an unsuccessful attempt to evade arrest (see Pet. App. A5 & n.5).

2. Following a bench trial, the district court found petitioner guilty of criminal contempt for disobeying the bankruptcy judge's show-cause orders. Cr. No. H-86-275 (S.D. Tex. Nov. 10, 1986). The district court rejected petitioner's contention that the bankruptcy judge lacked jurisdiction to order him to appear for a show-cause proceeding and that, in consequence, the show-cause orders were not "lawful" for purposes of Section 401(3). The court held that bankruptcy judges "as adjuncts [of Article III courts] must be able to conduct hearings and gather evidence to certify their proposed findings to the District Court" because "[t]o hold otherwise would make a mockery of an Article I [bankruptcy] Judge's function" (slip op. 10).

The district court also rejected petitioner's contention that he had not acted wilfully in failing to comply with the show-cause orders. Based on its review of the record, the district court found that petitioner "had knowledge of * * * [the] Orders to Show Cause and made a conscious and informed de-

cision to intentionally disregard those orders" (slip op. 7). Accordingly, the court concluded that petitioner's actions "demonstrate the requisite intent for a finding of criminal contempt" (*id.* at 6).

3. The court of appeals affirmed (Pet. App. A1-A17). In addressing petitioner's challenge to the validity of the show-cause orders, the court of appeals acknowledged "great uncertainty" among the courts over "the authority of Article I bankruptcy courts to adjudicate cases of civil contempt" (*id.* at A15). However, the court pointed out that the orders at issue were not orders adjudging petitioner in contempt; instead, they were simply orders directing petitioner to appear and show cause why he should not be found in contempt (*id.* at A16). The only order holding petitioner in contempt was the criminal contempt order issued by the district court. Accordingly, the court found it unnecessary to resolve whether the bankruptcy judge had the power to enter a valid order of civil contempt. Instead, the court had to decide "only the narrow issue" of whether bankruptcy judges have the power "to determine whether their orders are being obeyed" (*ibid.*).

The court of appeals concluded that bankruptcy judges possess that power. The court recognized (Pet. App. A16-A17) that under 28 U.S.C. (Supp. III) 157 the authority of a bankruptcy judge to enter judgments in a bankruptcy proceeding depends on whether the proceeding constitutes a "core proceeding" under the Bankruptcy Code. However, the court noted (Pet. App. A17), Section 157 by its terms authorizes bankruptcy judges to "hear" a bankruptcy proceeding regardless of whether the proceeding qualifies as a core proceeding and thus re-

gardless of whether the bankruptcy judge is authorized to enter a judgment on the basis of the proceeding. Accordingly, the bankruptcy judge "had authority to hear a proceeding related to the case" (Pet. App. A17).

The court of appeals also rejected petitioner's challenge to the district court's factual findings on wilfulness. It concluded that the bankruptcy judge's second show-cause order, which stated that petitioner "failed to appear before the Court" at the time of the first show-cause hearing and that petitioner would be given "one more chance to appear," eliminated "[a]ny possible confusion" as to whether the judge was commanding petitioner to make a personal appearance (Pet. App. A5, A6-A7). Accordingly, the court of appeals determined that the district court had not clearly erred in finding that petitioner had known he was being commanded to appear in person before the bankruptcy judge (*id.* at A8-A10).

ARGUMENT

1. Contrary to petitioner's suggestion, this case does not provide an occasion for this Court to determine the contempt powers of federal bankruptcy judges. The court of appeals expressly declined to address the question, which has been debated by other courts, whether bankruptcy judges may enforce their substantive orders by holding persons who disobey them in contempt. Instead, the court decided the different and narrower question whether bankruptcy judges may hold hearings to investigate whether and why their orders have been disobeyed. The court's resolution of that question is correct and is not in conflict with the decision of any other court.

a. As petitioner states and the court of appeals noted (Pet. App. A15), following *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and subsequent bankruptcy legislation, federal courts have reached differing conclusions regarding the authority of bankruptcy judges to hold litigants in contempt. A number of courts have concluded that bankruptcy judges have authority to hold persons in contempt under the current bankruptcy statutes and that the exercise of that authority by an Article I tribunal is constitutionally permissible.[1] Other courts have held that bankruptcy judges may not exercise the contempt power, concluding either that Congress has not vested them with that power or that the contempt power may be exercised only by an Article III tribunal.[2]

In this case, however, the court of appeals found it unnecessary to decide whether bankruptcy judges enjoy the power to sanction contempt: in the court's words (Pet. App. A16), that issue "is beyond our concern in this case." As the court observed, the bankruptcy judge had not entered an order adjudging petitioner in contempt, but rather had merely ordered petitioner to appear at a hearing to de-

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[1] See, *e.g.*, *Kellogg* v. *Chester*, 71 Bankr. 36 (N.D. Tex. 1987); *Better Homes of Virginia, Inc.* v. *Budget Service Co.*, 52 Bankr. 426 (E.D. Va. 1985), aff'd on other grounds, 804 F.2d 289 (4th Cir. 1986); *In re Johns-Manville Corp.*, 26 Bankr. 919 (Bankr. S.D.N.Y. 1983).

[2] See, *e.g.*, *In re Sequoia Auto Brokers, Ltd.*, 827 F.2d 1281 (9th Cir. 1987); *In re Cox Cotton Co.*, 24 Bankr. 930 (E.D. Ark. 1982), vacated on other grounds *sub nom. Lindsey* v. *Ipock*, 732 F.2d 619 (8th Cir.), cert. denied, 469 U.S. 881 (1984); *In re Industrial Tool Distributors, Inc.*, 55 Bankr. 746 (N.D. Ga. 1985).

termine the existence of contempt (*ibid.*). The order at issue here adjudging petitioner in criminal contempt was issued not by the bankruptcy judge, but by the district court. As a result, the court of appeals had no occasion to decide whether the bankruptcy judge would have been acting within her statutory and constitutional authority if she had held petitioner in contempt.

Even if the issue of the contempt power of bankruptcy judges were properly before this Court, we doubt for two related reasons whether it would merit the Court's attention at this time. First, although federal district courts have expressed inconsistent views on the issue (see notes 1 and 2, *supra*), there is no conflict among the courts of appeals. Only one court of appeals (the Ninth Circuit in *In re Sequoia Auto Brokers, Ltd.*, 827 F.2d 1281 (1987)) has decided the issue, holding that "Congress has not conferred the civil contempt power on bankruptcy judges" (*id.* at 1291).[3]

Second, the federal Bankruptcy Rules have undergone revisions within the past ten months which should substantially clarify the proper handling of contempt proceedings. As amended, Bankruptcy Rule 9020 now expressly authorizes bankruptcy judges to determine claims of contempt and issue contempt orders; those orders are binding unless the contemnor files timely objections, in which case the contempt determination is subject to de novo review by the district court (Rule 9020(b) and (c); see also Rule 9033 (b)). Because the contempt procedures now authorized by Rule 9020 have been in effect only since

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[3] The Ninth Circuit expressly declined to reach the constitutional question in *Sequoia* (see 827 F.2d at 1289-1290 n.15).

August 1987 (see 55 U.S.L.W. 4417 (Mar. 30, 1987)), few courts have yet had an opportunity to consider the impact of Rule 9020 on the contempt powers of bankruptcy judges.[4] It is entirely possible that, as the court of appeals forecast here, past disputes over this issue "will be settled" (Pet. App. A16 n.9) by the new revisions to Rule 9020. See, *e.g.*, *In re Miller*, 81 Bankr. 669, 678 (Bankr. M.D. Fla. 1988) ("the revised Bankruptcy Rule 9020 furnishes more than ample authority for bankruptcy courts to exercise civil contempt power").[5] Accordingly, review by this Court of the question whether bankruptcy judges may sanction contempt would be premature even if the issue were presented here.

b. The court of appeals' decision on the "narrow issue" (Pet. A16) actually presented by this case—the power of bankruptcy judges to hold hearings to investigate noncompliance with their orders—is correct and does not warrant review by this Court. As the court of appeals noted (Pet. App. A16-A17), while the scope of a bankruptcy judge's power to enter judgment in a particular proceeding depends on whether the matter qualifies as a "core proceeding," bankruptcy judges are authorized by statute to hold hearings in all proceedings relating to a bank-

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[4] The Ninth Circuit's decision in *Sequoia* involved a contempt order issued by a bankruptcy court in 1984. The court of appeals expressed "no opinion" with respect to the validity of contempt orders issued under the revised rule (827 F.2d at 1291 n.19).

[5] In his principal brief before the court of appeals (at 32 n.9), petitioner acknowledged that "[t]he problem [of the contempt authority of bankruptcy judges] will be resolved by the Supreme Court's [then-]proposed revision of the bankruptcy rules" contained in Rule 9020.

ruptcy case regardless of whether the proceeding is a "core proceeding" (28 U.S.C. (Supp. III) 157(b)(1) and (c)(1)). Moreover, the Bankruptcy Code expressly authorizes bankruptcy judges to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code (11 U.S.C. & Supp. IV) 105(a)). It was plainly "necessary [and] appropriate" for the bankruptcy court here to order petitioner, who was suspected of failing to comply with the order that he turn over property to the estate, to appear and explain his noncompliance.

Rather than take issue with the court of appeals' conclusion that bankruptcy judges are empowered to hold hearings to investigate potential violations of their orders, petitioner now makes the alternative argument (Pet. 12-14) that the particular show-cause orders at issue here were invalid because they effectively constituted a subpoena and petitioner was beyond the territorial reach of the bankruptcy judge's subpoena power under the Bankruptcy Rules and the Federal Rules of Civil Procedure. Petitioner raised this argument for the first time in his rehearing petition in the court of appeals, and this failure to raise the argument in timely fashion is sufficient reason in itself for this Court not to grant certiorari. Petitioner's argument would not merit this Court's review, however, even if petitioner had not been tardy in presenting it below.

The principal flaw in petitioner's argument lies in its assumption that the bankruptcy judge's show-cause orders must be deemed to be subpoenas. To the contrary, court orders aimed at determining whether prior judicial orders have been disobeyed have not been treated as subpoenas merely because they direct an individual to appear before the court to explain

his conduct. In *Brockton Savings Bank* v. *Peat, Marwick, Mitchell & Co.*, 771 F.2d 5 (1st Cir. 1985), cert. denied, 475 U.S. 1018 (1986), for example, a magistrate directed officers of a corporate defendant to appear in person to explain what appeared to be wilful disobedience of the magistrate's prior discovery orders. The party attacked the validity of the order on the ground that the officers were more than 100 miles beyond the territorial limits of the district court and therefore were outside the reach of the court's subpoena power under Fed. R. Civ. P. 45(e)(1) (771 F.2d at 9-10). The First Circuit upheld the validity of the order, rejecting the argument that the order "is in reality a 'subpoena requiring the attendance of a witness at a hearing or trial' pursuant to Rule 45" (*id.* at 10). The court of appeals reasoned that the district court had been acting "to vindicate the integrity of a proceeding which it had been managing" and that the order fell outside the ambit of Rule 45 because it was the product of a court's inherent power " 'to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.' " *Id.* at 11 (quoting *Link* v. *Wabash Railroad*, 370 U.S. 626, 630-631 (1962)).

In this case, as in *Brockton Savings Bank*, the show-cause orders were entered by the bankruptcy judge "to vindicate the integrity of a proceeding which [the judge] had been managing." The bankruptcy judge had ample authority to issue such orders, separate and apart from her general subpoena powers, by virtue of the statutory provisions discussed above. At the same time, the possibilities of undue burdensomeness posed by a traditional subpoena ad testificandum, which is issued by the clerk of the court at the request of a party without the intervention of the court, are simply not present. We

know of no case, and petitioner has failed to cite one, in which an individual has been permitted to thwart a court's attempts to determine the existence of contempt simply by removing himself more than 100 miles from the district and invoking the geographic limits of the court's subpoena power.[6]

2. Petitioner's remaining contention (Pet. 14-16) is that the court of appeals erred in sustaining the district court's factual finding that his disobedience of the show-cause orders was wilful. He suggests that the bankruptcy judge's show-cause orders were inherently ambiguous regarding petitioner's obligation to appear in person, especially when read together with 28 U.S.C. 1654, which provides that "[i]n all courts of the United States the parties may plead and conduct their cases personally or by counsel."[7] Petitioner's assertions regarding his state of

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[6] This case is distinguishable from *GFI Computer Industries, Inc.* v. *Fry*, 476 F.2d 1 (5th Cir. 1973), which petitioner unsuccessfully urged on the court of appeals as controlling authority in his rehearing petition (Pet. 10-11). In *GFI*, the district court commanded a defendant who resided beyond the territorial limits of the court's subpoena powers to personally attend the trial. However, the district court's order in *GFI* was not designed, like the orders at issue here and in *Brockton Savings Bank*, to facilitate an investigation into noncompliance with prior court orders. Moreover, even if the present decision did conflict with *GFI*, a conflict within the Fifth Circuit would not warrant review by this Court.

[7] Although petitioner's references to Section 1654 are not entirely clear, we do not understand petitioner to be arguing that Section 1654 constitutes an independent bar to an otherwise valid order commanding an individual to appear in person before a court. In his filings before the court of appeals, petitioner advised the court that he "does not contend that [Section] 1654 imposes a jurisdictional limitation upon a

mind have been considered and rejected by both courts below. For the reasons set forth in detail in the court of appeals' opinion (Pet. App. A2-A3, A6-A10), the record amply supports the district court's findings that petitioner wilfully disobeyed the order to appear in person. It has long been this Court's practice, absent extraordinary circumstances, not to disturb concurrent factual findings by an appellate and a trial court. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, No. 86-1626 (June 19, 1987), slip op. 7-8; *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *Graver Mfg.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). There is no reason for this Court to depart from that practice in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

WILLIAM KANTER
SCOTT R. MCINTOSH
Attorneys

MAY 1988

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court's authority to direct a person to appear physically in court in response to show-cause orders" (Appellant's Answers to Questions Preceding Oral Argument at 1-2). Any such contention would be plainly insubstantial, for as the court of appeals noted, Section 1654 "simply allows parties or their counsel to manage litigation; it does not * * * permit parties to disobey orders of the court" (Pet. App. A10).

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